IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 8343 OF 2004

BANK OF INDIA ... PETITIONER

vs

SMT. JYOTI BHARAT GADVE & ORS... RESPONDENTS

Mr. V. G. Peshave for petitioner

Mr. Y. S. Jahagirdar with Mr. G. S. Godbole for R-5

CORAM:-SMT. RANJANA DESAI, J.

DATED:-9-2-2005

P.C.

The petitioner is original defendant 2. The petitioner has challenged in this writ petition a decree of eviction passed against it under clauses (a) and (i) of Section 13(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, ("The Rent Act" for short).

2. Registered lease deed dated 7/10/1974 was entered into between the predecessors of respondents 1 to 4 ("the plaintiffs" for convenience) and respondent 5 ("defendant 1" for convenience) in respect of plot No. 15 and plot No. 16 located in Survey No. 46/2 and 46/B/1 situated at Parvati (suit plots) for a period of 35 years. Defendant 1 constructed two buildings thereon in the year 1975, one of which was on the eastern side and the other was on the western side. The lease deed contains a stipulation that lessee i.e. defendant 1 would be entitled to construct buildings on the open plot of land which would be utilized for the purpose of the lessee alone and that the lessee would not be entitled to sublet the premises without the permission of the owner and in case of breach of this condition the lease created in respect of the suit plots was liable to be terminated. It contains a further stipulation that after expiry of the lease period the lessor would be entitled to take possession of the buildings standing thereon after paying the market price thereof.

3. According to the plaintiffs defendant 1 let out different portions to defendants 2 to 5 without the consent of the plaintiffs thus committing breach of the agreement. Defendant 1 let out premises on the ground floor and the first floor in the building on the eastern side to defendant 2. The

plaintiffs therefore, by their notice communicated to defendant 1 that they are not interested in purchasing the buildings constructed by defendant 1. The plaintiffs called upon defendant 1 to demolish the buildings and deliver vacant possession of the suit plots to the plaintiffs. Defendant 1 failed to do so. Hence the plaintiffs filed the instant suit. According to the plaintiffs there is no privity of contract between the plaintiffs and defendants 2 to 5 but since they are occupying the buildings standing on the suit plots they are impleaded as the defendants.

4. The trial court decreed the suit. An appeal was carried therefrom. The lower appellate court confirmed the findings of the trial court. A writ petition came to be filed by defendant 1 in this Court. It appears that at that stage the matter was remanded to the lower appellate court with a permission to the parties to lead evidence on subsequent events. Parties led evidence. Defendant 6 was impleaded as party defendant. The trial court dismissed the appeal and hence this petition.

5. Mr. Peshave, the learned counsel for the petitioner submitted that defendant 1 who is the owner of the premises constructed by it let them out to defendant 2. He submitted that letting out constructed premises would not amount to subletting. In this connection he relied on Sitaram Narayan

Shinde v. Ibrahim Ismail Rais 2005(1) MLJ 35.

6. He then contended that original landlord did not take any action against defendant 1 though defendant 1 had sublet the constructed premises. He died in the year 1991. Thereafter the plaintiffs also did not take action against defendant 1 till the filing of the instant suit in the year 1999. Hence a case of waiver is squarely made out.

7. Mr. Peshave then contended that during the pendency of the appeal defendant 1 sold the eastern portion to defendant 6 with the consent of the plaintiffs. This reflects on the credibility of the plaintiffs' case and also indicates collusion. In this connection he relied on Burmah Shell Oil Distributing Now Known As Bharat Petroleum Corporation Ltd. v. Khaja Midhat Noor & Ors., (1988) 26 Reports (SC) 359. He further submitted that as the building which is presently in

occupation of defendant 2 is sought to be demolished defendant 2 is an aggrieved party and as such would have locus to contest the present proceedings. He submitted that the judgments of the courts below indicate that these vital aspects have not received due consideration and hence they ought to be set aside as being perverse.

8. As against this Mr. Jahagirdar, the learned counsel appearing for the respondents contended that defendant 2 is a tenant of defendant 1 who has constructed the super structure. The letting out was done by defendant 1 in breach of the lease deed. As such a decree of eviction from the open plot of land was sought as against defendant 1. Defendants 2 to 5, who are inducted in the constructed premises by defendant 1 as its tenants have no locus. There is no privity of contract between them and the plaintiffs. There is no independent right in them qua the plaintiffs. In this connection he relied on a decision of this court in Ramkrishna Girishchandra Dode & Ors. v. Anand Govind Kelkar & Ors., A.I.R. 1999 BOMBAY 89. He also drew my attention to the judgment of the Supreme Court in Balavant N. Vishwamitra & Ors. v. Yadav Sadashiv Mule (Deceased) By LRs.) & Ors., 2004 Vol. 106 (4) Bom. L.R. 439 (SC) and contended that defendant 2 is not even a necessary party.

9. In Dode's case (supra) the lessee had in breach of the condition of the lease parted with possession of the construction put by him on the plot of land without first obtaining prior consent of the plaintiffs. The plaintiffs determined the tenancy of the lessee and filed a suit in eviction against the lessee. The suit was decreed. Obstructionists obstructed the execution of the

decree claiming rights and protection of the Rent Act. While negativing the claim of the obstructionist this court observed;

"Before adverting to their contentions in detail it must be borne in mind that the creation of tenancy is a matter governed by the provisions of Transfer of Property Act, 1882 and not by the Rent Act. It has been held by the Apex Court in Raizada Topandas v. M/s. Gorakhram Gokalchand A.I.R. 1964 S C 1348, that the Rent Act does not create tenancy which is a matter of contract. Creation of tenancy must be established by a contract between the lessors (the plaintiffs) and the obstructions in the present case. There has to be a privity of contract between the plaintiffs and the obstructionists., If there is no privity of contract between the landlord and the sub-lessees and where the landlord is the owner of the plot which has been let out to the lessee, who erects the structures and is the owner of the said structures and inducts licensees or sub-lessees the law recognises no independent right in the licensee or sub-lessee qua the landlord of the plot of land."

10. While summing up this court observed that the consistent view taken by this court is that where the landlord gets a decree for eviction from a plot of land against a tenant, the licensee or the subtenant inducted by the tenant on

the structure put by him has no right against the landlord. If, therefore, the landlord is entitled to get vacant possession of the land, he is entitled to evict the occupant in the said structure erected by the tenant, in as much as the occupant of the structure has no legal right against the landlord insofar as the land is concerned and the land must be put in possession of the landlord, free from any encumberance whatsoever.

11. Sitaram Shinde's case (supra) on which reliance was placed by Mr. Peshave has no application to this case. In that case the petitioner had constructed a house on the suit land and let it out to the respondents. The lower courts held that it was illegal subletting. In the facts of that case this court held that where the land belongs to one person and the superstructure belongs to another person and the owner of the superstructure lets out the superstructure; in the absence of any other evidence it cannot be held that the owner of the superstructure had sublet the land. This court was not considering the effect of a lessee committing breach of the condition of lease deed and letting out the constructed premises to the tenants. It was not dealing with the question of privity of contract between the landlord and persons illegally inducted by the lessee.

12. I may also refer to judgment of the Supreme Court in Balwant

Vishwamitra's case (supra). In that case the landlord had filed a suit for eviction of the heirs of the deceased tenant. The respondents claiming through the tenant obstructed the execution of the decree. It was held that there was no privity of contract between the landlord and the respondents. Therefore, it was not necessary to joint them as defendants in the suit. They were not necessary party.

13. It is also necessary to mention that defendant 2's witness Quazi Sayyad has admitted in his evidence that defendant 2 has no concern with the suit lands.

14. So far as allegation of collusion between the plaintiff, defendant 1 and defendant 6 is concerned, the lower appellate court has returned a finding that there is no evidence of collusion. The said finding does not deserve to be disturbed. Reliance placed on Burmah Shell's case (supra) is, in my opinion, misplaced. In that case the question was whether notice to quit needs to be given to a sublessee. It was held that there was no allegation of collusion between the lessor and the lessee and hence notice to sublessee was not necessary. This judgment can have no application to the present case.

15. So far as the plea of waiver is concerned, it must be noted that the

original tenant died in the year 1991 and the suit is filed by the plaintiffs in 1999. There is nothing to indicate conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right by the plaintiffs. This submission must, therefore, fail.

16. There is a concurrent unassailable finding of fact in favour of the plaintiffs about their bonafide and reasonable requirement. Defendant 2 who is inducted by defendant 1 in the superstructure constructed by it in breach of the lease deed has no privity of contract with the plaintiffs who are the landlords. There is no independent right in them. Defendant 1 has no right qua the land beneath the structure. The land must be put in possession of the plaintiffs. There is no error of law in the impugned judgments. Hence the petition is dismissed.

17. At this stage Mr. Peshave, the learned counsel for the petitioner states that the petitioner is desirous of approaching the Supreme Court and hence four months' time may be given. Mr. Jahagirdar, learned counsel for the respondents opposes this. In the circumstances of the case, the decree not to be executed for a period of eight weeks from today.

(SMT. RANJANA DESAI, J.)